TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958

No. 218

EMORY W. PARSONS, ERMA M. PARSONS, HOWARD H. PARSONS, ET AL., PETITIONERS,

vs.

FRANCIS R. SMITH, FORMER COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF PENNSYLVANIA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED JULY 25, 1958
CERTIORARI GRANTED OCTOBER 13, 1958

SUPREME COURT OF THE UNITED STATES

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IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Appendix to Appellants' Brief

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RELEVANT DOCKET ENTRIES—In Appeal No. 12299—
Civil Action No. 15229

May 12, 1953.	Complaint filed.
May 12, 1953.	Summons exit.
June 2, 1953.	Summons returned "on May 13, 1953 served Francis R. Smith and on May 21, 1953 served United States Attorney and on May 19, 1953 served Attorney General and Commissioner of Internal Revenue, both by registered mail, and filed.
June 5, 1953.	Appearance of Joseph G. Hildenberger, Esq., for defendant filed.
July 15, 1953.	Stipulation and Order of Court extending time for filing Answer to September 10, 1953 filed. Noted 7/16/53.
Sept. 16, 1953.	Stipulation and Order extending time for filing answer to 11/9/53 filed. 9/17/53 Noted.
Nov. 11, 1953.	Stipulation and Order extending time for filing answer to 1-8-54, filed. 11-12-53 Noted.
Jan. 8, 1954.	Answer filed.
Feb. 14, 1956.	Order to place on trial list filed.
Mar. 2, 1956.	Plaintiff's notice of taking deposition of J. William Wetter filed.

[fol. 2]

Mar. 2, 1956. Plaintiff's notice of taking deposition of James W. George, filed.

Mar. 26, 1956. Plaintiff's notice of taking deposition of James W. George filed.

Mar. 26, 1956. Plaintiff's notice of taking deposition of J. William Wetter filed.

May 15, 1956. Depositions of James H. George and J. William Wetter filed.

Nov. 29, 1956. Appearance of Charles I. Thompson, Esq. for Plaintiffs, filed.

Nov. 30, 1956. Trial — witness sworn. (Cont'd to 12/20/56)

Nov. 30, 1956. Stipulation of Facts filed.

Nov. 30, 1956. Pre-trial memorandum filed.

Dec. 14, 1956. Transcript of hearing of 11-30-56, filed.

Dec. 20, 1956. Trial—witness sworn.

Dec. 21, 1956. Trial concluded. CAV

Jan. 30, 1957. First supplemental stipulation of facts, filed.

Feb. 6, 1957. Transcript of testimony (Dec. 20 and 21, 1956) filed.

Feb. 13, 1957. Plaintiff's requests for findings of fact and conclusions of law filed.

May 10, 1957. Defendant's proposed findings of fact and conclusions of law (filed with Court 4-9-57), filed.

May 28, 1957. Opinion, Van Dusen, J., with findings of fact and conclusions of law, and Order in favor of Defendant, filed. 5-29-57 Noted & Notice Mailed.

[fol. 3]

May 28, 1957. Judgment in favor of Defendant, with costs, filed. 5-29-57 Noted & Notice Mailed.

June 13, 1957. Government's bill of costs, filed.

June 14, 1957. Notice of appeal by plaintiff's filed, copy mailed to H. K. Wood, Esq. 6-17-57.

June 14, 1957. Copy of Clerk's Notice to U. S. Court of Appeals, filed.

June 14, 1957. Bond for costs on appeal in the sum of $250.00 with Hartford Accident and Indemnity Company as surety filed.

July 5, 1957. Record transmitted to U. S. Court of Appeals.

Aug. 13, 1957. Defendant's bill of costs, filed.

Sept. 6, 1957. Plaintiffs' exceptions to Defendant's bill of costs and motion to stay taxation of costs pending appeal, filed.

IN UNITED STATES DISTRICT COURT

RELEVANT DOCKET ENTRIES—In Appeal No. 12300—
Civil Action No. 15230

May 12, 1953. Complaint filed.

May 12, 1953. Summons exit.

June 2, 1953. Summons returned "on May 13, 1953 served Francis R. Smith and on May 21, 1953 served United States Attorney, and on May 19, 1953 served Attorney General and Commissioner of Internal Revenue both by registered mail, and filed.

June 5, 1953. Appearance of Joseph G. Hildenberger, Esq., for defendant, filed.

[fol. 4]

July 15, 1953. Stipulation and Order of Court extending time for filing Answer to September 10, 1953 filed. Noted 7/16/53

Sept. 16, 1953.	Stipulation and Order extending time for filing answer to 11/9/53 filed. 9/17/53 Noted
Nov. 11, 1953.	Stipulation and Order extending time for filing answer, etc. to 1-8-54, filed. 11-12-53 Noted.
Jan. 8, 1954.	Answer filed.
Feb. 14, 1956.	Order to place case on trial list filed.
Nov. 29, 1956.	Appearance of Charles I. Thompson, Esq., for plaintiffs, filed. (#15229)
Nov. 30, 1956.	Trial—witnesses sworn (cont'd to 12/20/-56)
Nov. 30, 1956.	Stipulation of Facts filed. (#15229)
Dec. 14, 1956.	Transcript of hearing of 11-30-56, filed. (#15229)
Dec. 20, 1956.	Trial—witnesses sworn
Dec. 21, 1956.	Trial concluded. CAV
Jan. 30, 1957.	First supplemental stipulation of facts, filed. (#15229)
Feb. 6, 1957.	Transcript of testimony (Dec. 20 and 21, 1956) filed. (#15229)
Feb. 13, 1957.	Plaintiff's requests for findings of fact and conclusions of law filed. (#15229)
May 10, 1957.	Defendant's proposed findings of fact and conclusions of law (filed with Court 4-9-57), filed. (#15229)
[fol. 5] May 28, 1957.	Opinion, VanDusen, J., with findings of fact and conclusions of law, and Order in favor of Defendant, filed. 5-29-57 Noted & Notice Mailed. (#15229)
May 28, 1957.	Judgment in favor of Defendant, with costs, filed. 5-29-57 Noted & Notice Mailed.

June 13, 1957. Government's bill of Costs filed. (#15229)

June 14, 1957. Notice of appeal by plaintiffs filed, copy mailed to H. K. Wood, Esq. 6-17-57 (#15229)

June 14, 1957. Copy of Clerk's Notice to U. S. Court of Appeals, filed.

June , 1957. Bond for costs on appeal in the sum of $250.00 with Hartford Accident and Indemnity Company as surety filed. (#15229)

July 5, 1957. Record transmitted to U. S. Court of Appeals.

Aug. 13, 1957. Defendant's bill of costs, filed. (#15229)

Sept. 6, 1957. Plaintiffs' exceptions to Defendant's bill of costs and motion to stay taxation of costs pending appeal, filed.

IN UNITED STATES DISTRICT COURT

RELEVANT DOCKET ENTRIES—In Appeal No. 12301—Civil Action No. 15231

May 12, 1953. Complaint filed.

May 12, 1953. Summons exit.

June 5, 1953. Appearance of Joseph G. Hildenberger, Esq., for defendant filed.

[fol. 6]

June 17, 1953. Summons returned: "On 5-13-53 served F. R. Smith" and "on 5-21-53 served U. S. Attorney" and "On 5-20-53 served by Registered Mail upon Attorney General and Commissioner of Internal Revenue", and filed.

July 15, 1953. Stipulation and Order of Court extending time for filing Answer to September 10, 1953 filed. Noted 7/16/53.

Sept. 16, 1953.	Stipulation and Order extending time for filing answer to 11/9/53 filed. 9/17/53 Noted.
Nov. 11, 1953.	Stipulation and Order extending time for filing answer etc. to 1-8-54, filed. 11-12-53 Noted.
Jan. 8, 1954.	Answer filed.
Feb. 14, 1956.	Order to place case on trial list filed.
Nov. 29, 1956.	Appearance of Charles I. Thompson, Esq. for Plaintiffs, filed. (#15229).
Nov. 30, 1956.	Trial—witnesses sworn (cont'd to 12/20/56).
Nov. 30, 1956.	Stipulation of Facts filed. (#15229).
Nov. 30, 1956.	Pre-trial memorandum filed. (#15229).
Dec. 14, 1956.	Transcript of hearing of 11-30-56, filed. (#15229).
Dec. 20, 1956.	Trial—witnesses sworn.
Dec. 21, 1956.	Trial concluded. CAV.
Jan. 30, 1957.	First supplemental stipulation of facts filed. (#15229).
Feb. 6, 1957.	Transcript of testimony (Dec. 20 and 21, 1956) filed. (#15229).
[fol. 7]	
Feb. 13, 1957.	Plaintiff's requests for findings of fact and conclusions of law filed. (#15229).
May 10, 1957.	Defendant's proposed findings of fact and conclusions of law (filed with Court 4-9-57), filed. (#15229).
May 28, 1957.	Opinion, VanDusen, J., with findings of fact and conclusions of law, and Order in favor of Defendant, filed. 5-29-57 Noted & Notice Mailed. (#15229).

May 28, 1957. Judgment in favor of Defendant, with costs, filed. 5-29-57 Note & Notice Mailed.

June 13, 1957. Government's bill of costs, filed.

June 14, 1957. Notice of appeal by plaintiffs filed, copy mailed to H. K. Wood, Esq. 6-17-57 (#15229).

June 14, 1957. Copy of Clerk's Notice to U. S. Court of Appeals, filed.

June 14, 1957. Bond for costs on appeal in the sum of $250.00 with Hartford Accident and Indemnity Company as surety filed. (15229).

July 5, 1957. Record transmitted to U. S. Court of Appeals.

Aug. 13, 1957. Defendant's bill of costs, filed (#15229).

Sept. 6, 1957. Plaintiffs' Exceptions to Defendant's bill of costs and motion to stay taxation of costs pending appeal, filed.

[fol. 8]

IN UNITED STATES DISTRICT COURT

OPINION SUR PLEADINGS AND PROOF (INCLUDING ORDER)

(In All 3 Appeals.)

VAN DUSEN, J. May 28, 1957

FINDINGS OF FACT.

1. Plaintiffs Emory W. and Erma M. Parsons and Lawrence H. and Grace E. Parsons are individuals, resident in Orbisonia, Huntington County, Pa., and Howard H. and Martha Parsons are individuals, resident in Fort Littleton, Fulton County, Pa. (Stipulation of Facts).

2. Defendant Francis R. Smith is a resident in the Eastern District of Pennsylvania and was at all times relevant

hereto the duly appointed Collector of Internal Revenue for the First District of Pennsylvania, having entered office on May 1, 1945, and left office on November 11, 1952 (Stipulation of Facts).

3. Prior to January 1, 1943, Emory W. Parsons, Howard H. Parsons and Lawrence H. Parsons were members, together with their father, Alfred H. Parsons, in a partnership doing business under the name of A. H. Parsons & Sons. Effective January 1, 1943, plaintiffs Emory W. Parsons, Howard H. Parsons and Lawrence H. Parsons purchased the partnership interest of A. H. Parsons and formed a successor partnership doing business as equal partners under the name of Parsons Brothers. Plaintiff Lawrence H. Parsons withdrew from that partnership, effective as of December 31, 1948,[1] and plaintiffs Emory W. Parsons and [fol. 9] Howard H. Parsons thereafter continued to do business as equal partners under the name of Parsons Brothers. As hereinafter used, the term "Parsons" shall mean whichever of the three partnerships referred to in this paragraph as may be appropriate in the context (Stipulation of Facts and N. T. 4).

4. Plaintiffs Emory W. Parsons, Howard H. Parsons and Lawrence H. Parsons filed individual income tax returns for the years 1945, 1946 and 1947. Plaintiffs Emory W. Parsons and Erma M. Parsons, and plaintiffs Howard H. Parsons and Martha Parsons, filed joint income tax returns for the years 1948 and 1949. Plaintiffs Lawrence H. Parsons and Grace E. Parsons filed a joint income tax return for the year 1948 (Stipulation of Facts).

5. On the income tax returns in paragraph 4, plaintiff Emory W. Parsons for the years 1945, 1946 and 1947, and

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[1] When Lawrence H. Parsons left the partnership, no new agreement was made with Rockhill (N. T. 94) similar to the January 1, 1943, agreement when A. H. Parsons left such partnership, and a letter to Rockhill (P-4), accepted by Mr. Wetter on behalf of Rockhill (N. T. 52), served to give the new partnership all the rights, interests, and obligations of the former partnership (N. T. 50-3, 192 and see Exhibit D-21). Wetter testified that he had no recollection of being apprised of L. H. Parsons' leaving the partnership in 1949 and Rockhill just kept doing business with Parsons Brothers (N. T. 192 and see Exhibit D-28).

plaintiffs Emory W. Parsons and Erma M. Parsons for the years 1948 and 1949, paid federal income tax to defendant as follows:

1945	$ 6,457.96	($1,123.75 of such amount was paid to defendant's predecessor in office.)
1946	$13,529.66	
1947	$29,325.04	(Plus subsequent deficiency and interest payment of $3,372.45 and $767.39, respectively.)
1948	$34,464.04	(Plus subsequent deficiency and interest payment of $4,024.08 and $671.22, respectively.)
1949	$33,316.50	(Less refund unrelated to the issue in this case of $2,029.93.)

and timely filed with defendant claims for refund (Exhibits A to E), as follows:

[fol. 10]

1945	$2,139.17
1946	1,720.44
1947	6,688.05
1948	5,715.36
1949	5,630.26

(Stipulation of Facts).

6. On the income tax returns in paragraph 4, plaintiff Howard H. Parsons for the years 1945, 1946 and 1947, and plaintiffs Howard H. Parsons and Martha Parsons for the years 1948 and 1949, paid federal income tax to defendant as follows:

1945	$ 6,374.19	($1,100.30 of such amount was paid to defendant's predecessor in office.)
1946	$15,823.53	(Plus subsequent deficiency and interest payments of $10,838.06 and $2,334.94, respectively.)
1947	$31,339.01	(Plus subsequent deficiency and interest payments of $3,380.49 and $769.22, respectively.)

1948	$35,467.06	(Plus subsequent deficiency and interest payments of $4,085.82 and $681.51, respectively.)
1949	$34,097.58	(Less refund unrelated to the issue in this case of $2,029.93.)

and timely filed with defendant claims for refund (Exhibits A to E) as follows:

1945	$2,122.88
1946	2,913.64
1947	6,774.32
1948	5,761.66
1949	5,666.32

(Stipulation of Facts).

[fol. 11] 7. On the income tax returns in paragraph 4, plaintiff Lawrence H. Parsons for the years 1945, 1946 and 1947, and plaintiffs Lawrence H. Parsons and Grace E. Parsons for the year 1948, paid federal income tax to defendant as follows:

1945	$ 5,902.85	($990.69 of such amount was paid to defendant's predecessor in office.)
1946	$15,557.53	(Plus subsequent deficiency and interest payments of $10,747.81 and $2,315.74, respectively.)
1947	$34,944.94	(Plus subsequent deficiency and interest payments of $3,509.19 and $798.42, respectively.)
1948	$37,122.99	(Plus subsequent deficiency and interest payments of $4,187.71 and $698.51, respectively.)

and timely filed with defendant claims for refund (Exhibits A to D), as follows:

1945	$2,078.42
1946	2,895.81
1947	6,908.73
1948	5,814.22

(Stipulation of Facts).

8. The Commissioner of Internal Revenue notified plaintiffs by registered mail of the disallowance of the claims set forth in paragraphs 5, 6 and 7 (Stipulation of Facts).

9. The principal activities of Parsons from 1939 to the fall of 1942 were building highways or roads and some coal stripping. Presently, Parsons is engaged in coal stripping and drilling of gas wells (N. T. 5).

[fol. 12] 10. During the taxable years 1945 through 1949, Parsons was engaged in removing overburden and strip mining coal on the property of Rockhill Coal Company (hereinafter called "Rockhill") (Stipulation of Facts).

11. Parsons first stripped coal on Rockhill property in 1939, when they leased a tract known as the Fire Tower Tract for the purpose of strip mining thereon. Parsons was unable to sell the coal taken out because it was oxidized, but an analysis of it by Rockhill found that Rockhill could use it by mixing it with their deep mined coal (N. T. 14). Parsons surrendered the lease to Rockhill and the agreement of February 17, 1941 (Exhibit P-1), was made between these parties under which Parsons continued to strip the remaining coal on the Fire Tower Tract (N. T. 14-6, 94, 95, 151). Parsons finished stripping the Fire Tower Tract in 1943 (N. T. 16).

12. In February of 1942, Rockhill approached Parsons with a view toward entering into another contract to cover an additional area to be stripped by Parsons on Rockhill's land (plaintiffs' Request for Finding of Fact No. 20).

13. On February 27, 1942, a meeting was held at Rockhill's office in Robertsdale, Pa., at which plaintiff Emory W. Parsons, Mr. James George, General Manager of Rockhill, and Mr. Thomas F. Morgan, Mining Engineer of Rockhill (now deceased), were present (N. T. 14, 17, 155, 231, 232). At that meeting, using a large map on the wall of the office, the parties settled upon a particular area with respect to future stripping operations to be done by Parsons and agreed that a written agreement would be prepared by Mr. Morgan and later submitted to Mr. Parsons for his signature. A blueprint, which was attached to this

contract when written, delineated the area pointed to on the wall map (N. T. 17-8, 232).

[fol. 13] 14. An agreement dated March 2, 1942 (Exhibit P-2),[2] was prepared by Mr. Morgan following this meeting to cover the proposed area, and on several occasions after February 27 was presented by Mr. Morgan, in the presence of Mr. George, to Mr. E. Parsons for signature. Mr. Parsons did not sign the agreement (N. T. 17-21, 25, 86-7, 152, 232).

15. Mr. E. Parsons did not sign the written contract dated March 2 since he did not want to be bound to a contract requiring the performance of stripping which would take a long time,[3] since, if an opportunity opened up, he wanted to go back to road building work.[4]

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[2] P-2 is admissible as evidence of the terms of the oral 1942 agreement, even though the language of P-2 was rejected by the parties (N. T. 19-20).

[3] During the trial, the witnesses referred to the 1942 written agreement (P-2) as a long-term contract, apparently because the stripping required by it would take a long time.

[4] See testimony of Mr. George to this effect (N. T. 152). Mr. Wetter testified that he saw Mr. E. Parsons on the mining property sometimes in 1942 and would then discuss the work with him. His testimony substantiated that of Mr. George as to the statements of E. Parsons concerning the reason why he did not want a written agreement. Also, Mr. Wetter testified that, at the meeting in Mr. George's office with E. Parsons in August 1943, Mr. Parsons reiterated those statements (N. T. 180, 183). Plaintiff E. Parsons, contrariwise, testified that he did not sign P-2 because the agreement had a definite amount to be stripped in the area enclosed in the red lines on the attached map and if he signed, he would have been tied to strip the entire area, all of which had already been mined. He testified that when, at the time of the February 27 meeting in Rockhill's office, he looked at the map on the wall, he had not known that Rockhill was going to include the old workings in that area but that, while the agreement was being written, he looked over the area (something he had not done at the time of the February 27 meeting—N. T. 18) and found that half of it had previously been deep mined and the shaft into it was lying on such a steep pitch that he did not know whether he could strip it or not (N. T. 21, 95, 96, 98, 115). Though the Kelly seam, the Speer seam, and part of the Barnett seam had solid coal (N. T. 96-7), plaintiff

[fol. 14] 16. Parsons instead proposed that they would operate the property for Rockhill on the area that was assigned to them if there was no written contract but a terminable arrangement on terms similar to the 1941 written agreement (N. T. 152).[5] George and Morgan stated that they could not accept Parsons' proposal until they took it up with Mr. William Wetter, President of Rockhill, who was in Philadelphia (N. T. 14, 22, 26, 115, 152).

17. A week or two later George told Parsons that Rockhill would agree to such a verbal agreement[6] under which, if Parsons or Rockhill wanted to quit, all that was necessary to terminate the arrangement was the giving of a

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E. W. Parsons testified that he did not make, ask for, or want a written agreement with Rockhill for those areas or any of the other areas they stripped on Rockhill property (N. T. 82, 98-9). He also testified that he signed the 1941 agreement (P-1) because the area had previously been drilled by the coal company in the center of the property and it was a solid piece of coal (N. T. 101). Thus, plaintiff E. W. Parsons' testimony that, unless Parsons had previously prospected or drilled the area so that they could determine how much coal they could strip on the specific area, they would not sign a written agreement (N. T. 99, 100), does not seem capable of reconciliation with the fact that when they did discover that they had a solid piece of coal on certain of the Rockhill areas they stripped, they still did not want a written agreement (N. T. 102). In addition, the testimony of Mr. Wetter seemed most persuasive to the trial judge.

[5] Plaintiff E. Parsons, though, testified that the coal stripping was done under an oral modification of the 1941 written contract (N. T. 77, 82-3). But, though most of the bi-weekly statements sent to Parsons from Rockhill for the period following the winter of 1942, showing the amounts of coal loaded during the preceding two weeks (P-5) specified February 17, 1941, as the contract date (some of these statements have no date and others use the date February 17, 1942--see D-15), such notations are inconsistent with the evidence in the record (see Exhibits D-14 and D-15).

[6] It was Rockhill's intention to get a written contract if they could. They were willing to accept the oral arrangement suggested by Mr. Parsons in place of the written agreement that Parsons refused to sign because they needed coal very badly at that time. They were losing their men in the deep coal mines they operated and had to increase their tonnage through stripping operations (N. T. 206).

ten-day notice. Parsons agreed to this arrangement (N. T. 152, 153, 185).[7]

[fol. 15] 18. If Rockhill had cancelled on ten-day notice and Parsons had previously gone to the expense of removing the overburden (thereby performing the heavy part of the work, as well as meeting wages and expenses in so doing), then Parsons would have had the privilege of taking out the coal under the above-mentioned removed overburden and of being paid for it, apparently even though this took more than ten days (N. T. 184, 185). Plaintiffs were not bound to remain until the prospected coal was exhausted. They had the right, however, to stay and take out from the coal they found as much coal as they economically could take out at a profit with their equipment (N. T. 119-122).[8]

19. The amount of equipment or the number of workers that Parsons could have used on the allocated areas was in the discretion of Parsons (N. T. 213, 242, 249). Similarly, the quantity of coal stripped was in the discretion of Parsons subject to the following two sentences (N. T. 213-4). But if Parsons stripped coal at such a rate that Rockhill could not get enough of their deep mined coal to

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[7] Mr. Parsons testified to the contrary that his counter-proposal to his refusal to sign the March 2 written contract was that he would go on the area, prospect it, and strip it under the same terms as their 1941 agreement. He proposed to go any place on their property and prospect such area, provided that, if he found any coal, he would have the right to take the entire piece out (N. T. 21, 23, 26, 82, 83, 98, 99, 115, 118, 119). He specified that Mr. George accepted this proposal after getting permission to do so from Mr. Wetter and told him a week or two after March 2 that it was satisfactory for him to go ahead and prospect the area on those terms (N. T. 22, 29, 116). He testified that nothing was said about the right of either party to terminate the agreement (N. T. 22-3). E. Parsons also testified that he believed that Rockhill did not have the same right to terminate the arrangement that Parsons enjoyed. He claimed that only if there was no longer any coal prospected could Rockhill have terminated on 30 days' notice (N. T. 119), while when Parsons did finally cancel in 1950, giving 30 days' notice, they were not violating the agreement (N. T. 118).

[8] When Parsons quit the job site in 1950, there was never any discussion of damages (N. T. 208).

blend with the stripped coal, then Rockhill did not have to accept the coal that Parsons stripped, but would have had to terminate the oral arrangement under the ten-day clause (N. T. 171, 210, 213-4 and paragraph 18 of the 1941 written contract). In this manner, Rockhill controlled the quality and quantity of coal that Parsons stripped (N. T. 214, 221).

20. Rockhill reserved the right to hire other strippers to strip in areas not allocated to Parsons (N. T. 210-1).[9] On ten days' notice, Rockhill could have put another stripper on any area that had been allocated previously to Parsons (N. T. 211).

[fol. 16] 21. Rockhill, and not Parsons, had the right to sell all the coal (N. T. 212, 220).[10] Parsons never sold any coal that it mined from Rockhill property (N. T. 115). Parsons did not have the right to receive payment in coal rather than in money (N. T. 221). If the coal was not blendable, the record indicates that it was not feasible for Parsons to sell it to anyone else[11] (see Finding of Fact No. 28 below).

22. Parsons was paid a stated amount[12] of money per ton of coal delivered to Rockhill's railroad cars (N. T. 35-

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[9] In 1950, Rockhill employed another contractor on another section of their property (N. T. 103).

[10] Parsons was not given legal title to the Rockhill properties (N. T. 211).

[11] The record indicates that it was necessary to use the railroad owned by Rockhill in order to transport the coal to market (N. T. 23, 46-8, 124, 153; cf. 35-6). This indication that Rockhill was the only feasible purchaser of any coal secured from this area due to its ownership of the railroad is confirmed by (1) the testimony that Miller & Corrie sold coal to Rockhill, which coal was loaded on the latter's railroad (N. T. 49), and (2) the testimony that Parsons left the coal rejected by Rockhill in the pits at the termination of its coal stripping for Rockhill (N. T. 38, 48). (See Findings of Fact Nos. 28 and 35.)

[12] The price per ton paid to Parsons was a fixed amount and was not to vary if the market price went up or down. There was no provision in any of the contracts for increases or decreases in such price in relation to the market prices (N. T. 108), but in setting

6).[13] According to the oral contract,[14] changes in the stated price per ton were to reflect only increases in wage or labor costs (N. T. 36, 108), but after the increases began to take effect in materials and explosives, Rockhill went along with Parsons and granted increases for such reasons (N. T. 37, [fol. 17] 87, 212).[15] These additional increases were in the nature of new oral agreements.[16]

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the price, Parsons took into consideration that such price would include their profit (N. T. 88). Rockhill assumed the risk of a change in the market price (N. T. 211-2), but see footnote 16 below.

[13] The contracts under which Parsons operated were salvage contracts, as distinguished from yardage contracts. In a salvage contract there are no separate payments for the removal of overburden as there are in a yardage contract. The stripper takes the risk, but the price reflects that risk. In a salvage operation, the price paid per unit of coal is predicated upon the total cost of doing the job (N. T. 195-6). If a stripper found no coal, he would not get paid for expenses in removing such overburden, but such a result was not likely to have occurred on the Rockhill lands, known to have coal deposits therein (N. T. 196-7).

[14] The unsigned March 1942 agreement, which was offered to Parsons, provided for a fixed price per ton of merchantable coal which the stripping contractor was to be paid (N. T. 86, 101).

[15] From 1942 to 1950, on those areas not covered by the 1941 written contract, price increases were handled in the same way as under the terms of the 1941 contract—namely, E. Parsons met with George and Morgan and they together figured out the increase on a tonnage or percentage basis (N. T. 36-7, 117, 124). Though the 1941 agreement provided only for increases due to labor increases, Parsons also negotiated and received increases in price for increases in the cost of materials (N. T. 117-8), except that for increases due to the latter factor, Parsons alone figured it out and then asked Rockhill for an increase in price (N. T. 125).

[16] Under the 1941 written agreement, a price increase was given on August 15, 1941, to $1.65 per ton (N. T. 155), and the price fixed in the new oral contract was, similarly, $1.65 per ton of coal delivered at Rockhill's tipple in the railroad car (N. T. 153). On February 1, 1943, the price was increased to $1.78 because of wage increases (N. T. 156). On August 12, 1943, the price was increased to $2.00 after E. Parsons told Wetter and George that Parsons was going to quit and take their equipment off Rockhill property in about three months when they took out an estimated 15,000 more tons from the Fire Tower tract and the Thomas tract (Area No. 2),

[fol. 18] 23. The price per ton of coal delivered paid to Parsons covered all the work incidental thereto. It included all of Parsons' expenses in prospecting and mining the coal, the cost of roads they had to build, depreciation on their equipment, the cost of their supplies, the cost of their labor,

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since they could lease on a rental basis their equipment at a greater price than they were getting for removing coal ($5,000. monthly profit renting as against their present $780. monthly profit) or they would get a higher price per ton ($2.25) for stripping in the Clearfield County area. Rockhill agreed to the price increase, which was not based on an increase in labor costs or on material costs, if Parsons would build a road and open a 30-acre tract due north of the Thomas tract (N. T. 160-2).

E. Parsons testified, though, that all of the increases given to Parsons by Rockhill were based on those two latter reasons, and that plaintiffs never asked for an increase because other strippers were being paid more per ton than plaintiffs were getting, though they may have made such a representation in conversations with Rockhill's representatives (N. T. 111-5).

Since Mr. George, who testified contrary to the testimony of E. Parsons, testified upon his present recollection as refreshed by notes which were made in 1954 from a statement answering an inquiry from the Federal Government and Tax Division, when George first knew he was to be a witness in this case, and such statement was made from papers in his file that were made at or about the time of the events (N. T. 154, 158-9, 214-6, 22), his testimony will be accepted as more accurate. Later, the defendant offered the original notes and memoranda made contemporaneously with the meetings with Mr. Parsons, at various times from 1940 to 1950, in evidence (N. T. 22, 225-31, Exhibits D-16 through D-30).

On July 1, 1944, the price was reduced to $1.98 because Rockhill assumed the responsibility of slate picking at the tipple and in the pit (N. T. 162-3). On November 1, 1944, the price was increased to $2.23 due to increased costs for drilling equipment and explosives necessitated because of high overburden (N. T. 165 and Exhibit D-22). On August 9, 1945, the price on the Fulton and Barnett seams was increased 5¢ per ton to $2.28 and the price on the Kelley seam was increased 25¢ per ton to $2.48 (N. T. 164-5 and Exhibit D-23). These increases averaged out to $2.38 per ton for all the three seams. For the period between May 1, 1945, and July 1, 1945, a retroactive increase of 15¢ per ton was given by Rockhill (N. T. 166). On July 1, 1946, the price was increased 10¢ to $2.48 per ton due to increased labor costs. On September 1, 1946, the price was again increased 10¢ to $2.58 per ton (N. T. 167-8). On November 14, 1956, the price was increased 30¢ to $2.88 per ton due to material changes and was then reduced 25¢ to $2.63 per ton due to Parsons' starting to operate Rockhill's 621-S Page Dragline

the cost of dockage, the cost of creating a tipple and the cost of picking or cleaning the coal (until the latter was taken over by Rockhill and such cost was deducted from the payment per ton given to Parsons) (N. T. 87-8, 154, 179, 238).[17]

24. In all the areas where Parsons worked on Rockhill property, Rockhill made the necessary deposit under the Bituminous Coal Open Pit Mining Conservation Act, as amended, 52 P. S. 1396.1-1396.20, for restoration and replanting of the property after the stripping operation was completed, as required by the Act (N. T. 193-4, 221).[18]

25. The areas in which Parsons was to work were allocated by Rockhill's Engineering Department, which pre- [fol. 19] liminarily surveyed the area on which Parsons was

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(N. T. 168 and Exhibit D-24). On July 15, 1947, the price was increased 25¢ to $2.88 per ton due to increased labor costs (N. T. 169 and Exhibit D-25). In 1948, the price was increased 20¢ to $3.08 per ton due to the cost of explosives necessitated by heavy overburden (N. T. 169 and Exhibit D-26). On June 1, 1949, the price was reduced 20¢ to $2.88 per ton due to Parsons' starting to use a second (the 625) dragline of Rockhill (N. T. 169 and Exhibit D-27).

[17] Exclusive of the Fire Tower tract, during the years 1942 through 1950, for work on the areas under the new oral contract, Parsons paid the expenses of the stripping operation which included: labor compensation, social security, unemployment compensation, repair parts, fuels, truck hire, equipment, rental, and explosives (N. T. 35). From 1942 on, Parsons had to build or resurface approximately six miles of road in connection with their entire stripping on Rockhill property (N. T. 24, 35). Also, in 1945 Parsons cleared the right of way and graded it so a railroad going up to Area No. 7 could be put down (N. T. 47-8). But some roads were put in before Parsons went into those areas (N. T. 110). From 1943 to the present, Parsons never built any roads other than roads in connection with stripping operations (N. T. 50).

[18] 52 P. S. § 1396.4 requires any operator (a person engaged in open pit mining and "who is or becomes the owner of such coal as a result of such mining"—see 52 P. S. § 1396.3) to file "a bond . . . conditioned that the operator shall faithfully perform all of the requirements of this act." The operator may deposit cash, United States Government bonds, Commonwealth of Pennsylvania bonds, Pennsylvania Turnpike bonds, or similar bonds, in connection with the above-described bond (see N. T. 193-4).

to operate (N. T. 170, 221).[19] All of the Rockhill property previously had been completely drilled and tested and some of it had been previously deep mined (N. T. 170, 176).[20] E. Parsons always was with Rockhill's engineer or inspector when any sites were taken into consideration (N. T. 247) and, similarly, Rockhill's engineer or inspector went along with Parsons when Parsons prospected for coal (N. T. 31, 37).[21]

26. When Parsons began stripping under the oral contract in March of 1942, they were still stripping the Fire Tower area covered by the 1941 written contract (N. T. 23-4).

27. Under the oral contracts, with the changes noted in footnote 16, Parsons stripped coal from March 1942 to September 1, 1950, on four different seams on the Broad Top region known as Fulton, Barnett, Kelley, and Speer (N. T. 7, 8, 204). Included therein were nine areas (N. T. 24, 29, 59, and Exhibit P-3). Area No. 1 was the Fire Tower tract (N. T. 29 and Findings of Fact Nos. 11 and 26). Area No. 2 was the area discussed at the meeting of [fol. 20] February 27, 1942 (N. T. 95 and see Finding of

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[19] In addition to designating the areas for stripping, Rockhill had control over where Parsons placed the waste material from the coal stripping operations (N. T. 171).

[20] The bore hole records provided by Rockhill were mostly exact, but unsuccessful prospecting in at least 100 places between 1942 and 1950 resulted from areas where there had been extended mining and areas where there were no bore hole records on the outcrop coal (N. T. 31, 239). Generally, the prospecting done by Parsons was 60% successful (N. T. 238). There was testimony that during these unsuccessful prospecting attempts, Parsons made use of Rockhill's bore hole records only once because such holes were drilled for mining purposes and carried a heavy cover (N. T. 32), but also there was testimony that Rockhill had an idea where coal could be found (N. T. 170). When the Miller Contracting Company took over the stripping operations after Parsons left in 1950, more often than not their prospecting was unsuccessful (N. T. 141-2).

[21] An inspector was on the job at all times. His duty was to see that the coal was properly cleaned before it was loaded. Rockhill did not assist Parsons in their stripping operations, but at one point they took over the picking (cleaning) operations (N. T. 221 and see Finding of Fact No. 24).

Fact No. 13 above). Following the making of the oral contract Parsons spent about one year stripping a portion of Area No. 2 and did get merchantable coal from it (N. T. 96, 98). When Parsons finished stripping Area No. 2, Rockhill took them to Area No. 3[22] and they prospected, found and stripped the salable coal there (N. T. 37, 47).

28. Area No. 9 was the last area Parsons stripped under their arrangement with Rockhill (N. T. 29, 30).[23] When Parsons ceased stripping for Rockhill, no coal was left uncovered on Area No. 9 (N. T. 38) and Parsons was not stripping profitably, as much of the coal was rejected and left in the pits (N. T. 38). But Parsons had not prospected, so that they did not know whether there was any coal usable by Rockhill left in the areas they were working (N. T. 103).

29. The Miller Contracting Company moved onto Rockhill property in 1949, and in September 1950 continued the stripping of Area No. 9 where Parsons left off (N. T. 49,

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[22] Under the oral contract, the General Manager of Rockhill had the right to designate the sites Parsons would strip (N. T. 212, 220). If the unsigned agreement of March 1942 had been executed each time the stripper moved to another area not covered by such an executed agreement, Rockhill would have made a supplemental agreement that would have covered such additional area (N. T. 187). Such contracts might be a master contract covering large areas or a contract covering a limited area and a succession of smaller supplements, each covering a specific area (N. T. 189). Evidence of a practice on behalf of Rockhill to make written contracts in its stripping arrangements is that Rockhill had two written contracts with Miller Contracting Company, which were supplemented with one contract combining them (N. T. 187). Mr. Wetter, President of Rockhill, testified that as a coal company executive, it was his practice, with the five or six strippers that he had dealt with and with the Miller Contracting Company, always to have a written agreement. Only with Parsons did he ever operate under an oral contract (N. T. 190-1).

[23] There is no evidence on exactly what part of Rockhill's land Parsons was strip mining during the years 1945 through 1949, except that Parsons was strip mining Area No. 9 when it quit. From the areas numbered 2 through 9, Parsons took out 15 pieces of coal (N. T. 30). From 1944 on, Parsons was stripping more than one piece at a time (N. T. 32, 35).

103, 136-7). The Miller Company stripped that area on three [fol. 21] separate occasions over a period of five years.[24] Initially, on taking over where Parsons left off, they did not get good, strippable coal but they then shifted the direction of their stripping operations and ran into good coal. From Area No. 9, the Miller Contracting Company got some of the best coal they ever got on Rockhill property (N. T. 138-147).

30. Parsons did not consider themselves bound to mine the Rockhill properties to exhaustion (N. T. 94). When they stopped operating on Rockhill property in 1950, strippable coal remained on the property (N. T. 204-6). Strip mining of Rockhill property was continued by the Miller Contracting Company until March 31, 1956 (N. T. 205), but 7 or 8 million tons of strippable coal that can be profitably removed still remained on the property when Rockhill sold such property on May 1, 1956 (N. T. 206, 248-9).

31. Rockhill started putting in its own equipment on the areas Parsons was working in 1946 (N. T. 103, 172).[25] During the years 1945 through 1949, Parsons removed some of its own equipment from the Rockhill property (N. T. 104).[26] In 1943 the value of the equipment that Parsons

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[24] The first time they stripped in the area, they took out coal from a five to six acre area, the second time from an area of about three acres, and the last time from an area of about five acres (N. T. 143-5).

[25] This equipment included a 621-S Page Walking Dragline valued at approximately $140,000. and a 625 Page Walking Dragline put on in 1948 valued at approximately $225,000. (N. T. 103-4, 171-2, Exhibit D-12). For the equipment Rockhill put on the job, Parsons paid a tonnage rental of 25¢ (N. T. 123).

[26] In July 1949, they sold a Northwest dragline and Bucyrus Monagan dragline, each valued at approximately $25,000., and a D-8 Caterpillar bulldozer valued at approximately $10,000. to the corporation plaintiff Lawrence Parsons worked for after leaving Parsons (N. T. 105-6, 132-3, 170). In 1945 and 1946, Rockhill sold a dragline that was never on Rockhill's property and a bulldozer (the bulldozer was taken from Rockhill's property) to Parsons Contracting Company (N. T. 106-7, 131). Parsons got Rockhill's consent to selling the equipment in 1948 and 1949, but for the one bulldozer sold to Parsons Contracting Company Parsons did not get Rockhill's consent since they considered it a small, old piece of equipment (N. T. 107-8).

[fol. 22] had on the Rockhill job was approximately $60,000. (N. T. 125-6).[27] In 1946, the total value of the equipment Parsons had on the job had increased to approximately $210,000. (N. T. 128).[28] In that year, Rockhill's own equipment being used by Parsons had a value of approximately $130,000. (N. T. 209). In 1949, Rockhill added to the equipment being used by Parsons for the coal stripping operation an additional dragline valued at $240,000. (N. T. 210), while Parsons' total equipment valuation on the job in 1949 was around $200,000. (N. T. 210).[29] When Parsons ceased stripping on Rockhill property on September 1, 1950, they had only $125,000. worth of equipment on Rockhill property (N. T. 133).[30]

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[27] The major pieces of equipment that Parsons had on the Rockhill job in 1943 were three tractors and scrapers, a loading shovel (20-B Bucyrus-Erie), and a 79 Lorrain high lift shovel. Also, they had a lot of small equipment, such as compressors, pumps and drills. Parsons paid $11,000. for each tractor and scraper, $10,000. for the loading shovel, and approximately $15,000. for the high lift shovel (N. T. 125-6).

[28] In 1944 Parsons bought three Euclid trucks costing about $40,000., increasing their total equipment valuation on the job in 1944 to approximately $100,000. (N. T. 127-8). In 1945, Parsons bought two draglines and two loading shovels, increasing their total equipment valuation on the job (exclusive of the equipment being used by the Miller and Corrie job—see Finding of Fact No. 35) in 1945 to approximately $180,000. (N. T. 127-8, 130-2). In 1946 Parsons bought a dragline and traded one of their draglines for a larger dragline, increasing their total equipment valuation on the job in 1946 to approximately $210,000. (N. T. 128).

[29] In 1947, Parsons bought three Euclid trucks, a bulldozer and a shovel, bringing the total value of equipment Parsons had on the job in 1947 to approximately $250,000. (N. T. 128). Parsons did not buy any equipment in 1948 but sold two scrapers and tractors for $10,000. and a dragline for $25,000., so that the total value of the equipment Parsons had on the job in 1948 was approximately $215,000. (N. T. 129-130). In 1949, Parsons maintained the same equipment on the job (N. T. 130), except for selling one dragline for $25,000. to the corporation plaintiff Lawrence Parsons formed on leaving Parsons (N. T. 133, and see Exhibit D-28).

[30] In view of the reasoning outlined in footnote 18 of opinion 3/26/57 in *Huss et al. v. Smith, Collector*, Civil Action Nos. 14,775-7

32. Under the 1941 written contract, Parsons had the privilege of removing any and all of its equipment in any [fol. 23] calendar year for the period from April 1 to September 1,[31] and Rockhill was not required to take any coal during that period.[32] Stripping under the 1941 written contract was suspended once when, as per the agreement, Rockhill only took coal from September 1 until April 1 and Parsons went out and did roadbuilding (N. T. 16, 118, and see Exhibit D-18), but Parsons never ceased their stripping operations during the summer months from 1942 to 1950 (N. T. 238).

33. In 1946, plaintiffs Lawrence H. and Howard H. Parsons formed an additional partnership, Parsons Contracting Company, which company strip mined the Kunkle tract and ceased operations in 1947 (N. T. 57-8, 85, 88). Parsons rented them equipment and took depletion on such tract for the royalties that were paid to them (N. T. 85-6, and see Exhibit D-28).

34. In 1943, Parsons moved onto and began strip mining Ednie Coal Company property at Broad Top City, about three miles from Rockhill property. The property did not turn out as well as Parsons believed it would and, with George's permission, they moved back into Rockhill property two days later (N. T. 202-4). There was no ob-

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(E. D. Pa.), the value of the equipment used by Parsons (which was subject to the deduction for depreciation) would seem to be irrelevant,—particularly in view of the substantial investment in such equipment by Rockhill.

[31] See paragraph 14 of the 1941 written contract, which was included at Parsons' request since they were road builders and thought they might do some roadwork in the summertime when the work was not steady. There was no understanding or discussion of that kind under the March 1942 oral contract (N. T. 175-6).

[32] By giving at least ten days' notice prior to April 1 of any calendar year, paragraph 14 of the unsigned March 1942 contract (P-2) permitted Rockhill to refuse to take coal under that contract during the period from April 1 to September 1. But in that contract no privilege was given to Parsons to remove any or all of its equipment (N. T. 233-8).

jection raised by Rockhill to Parsons' prospecting on Ednie property (N. T. 245).[33]

[fol. 24] 35. In 1945 and the early part of 1946, Parsons, in addition to stripping on Rockhill property, also stripped on George Miller property under a contract with Miller and Corrie. The coal Parsons stripped was bought by Rockhill from Miller and Corrie and loaded directly by Parsons on Rockhill's railroad (N. T. 49, 85).[34]

36. On August 1, 1950, plaintiff E. Parsons gave George (Rockhill's representative) thirty days' notice[35] of Parsons' ceasing operations (N. T. 38-9, 205, and Exhibit D-30). During the following thirty days, Parsons continued to strip mine[36] coal that had been cleared of overburden (N. T. 206) and continued operations until September 5, loading the coal they had stripped (N. T. 208).

37. After leaving their operations with Rockhill, Parsons began stripping as sub-lessee for the New York & Pennsylvania Company, Inc. (sub-lessor) in September 1950 under a lease agreement entered into on July 20, 1950, while still stripping for Rockhill (N. T. 59-60 and Exhibit D-31).

38. Depletion was never mentioned by either of the parties to the oral, March 1942 agreement (N. T. 88, 154, 179).[37] Under Parsons' new contract with the New York

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[33] George, Wetter and Morgan were officers and/or Directors of the Ednie Coal Company, and George and Wetter were stockholders of both Rockhill and Ednie (N. T. 242-5).

[34] 25% of plaintiffs' 1945 expenses and 5% of plaintiffs' 1946 expenses were attributable to the Miller and Corrie job (N. T. 50).

[35] Plaintiff E. Parsons offered a longer notice to Rockhill if thirty days was insufficient, but George said thirty days was all right (N. T. 38-9).

[36] When Parsons told Rockhill that they were quitting, Rockhill took over the operation of their 625 dragline that Parsons had been operating. To keep the job operating, Rockhill also purchased and put on the job the equipment that Parsons had sold to a dealer (N. T. 174).

[37] During the period Parsons was working for Rockhill, its representatives never requested their attorney to make a written agree-

[fol. 25] & Pennsylvania Company, Inc., Parsons receives percentage depletion (N. T. 60).[38] The Miller Company's stripping contract with Rockhill, signed in 1950, provides that the Miller Company has no economic interest in the coal (N. T. 142).

39. In the taxable years here under consideration, Rockhill took the depletion deduction on the operations performed by Parsons on Rockhill property (N. T. 178-9), and Parsons did not take such depletion on their partnership income tax returns (N. T. 89),[39] though, during those same years, Parsons' income tax returns did take depletion deductions on property other than Rockhill's (N. T. 92-4).

Paragraphs 9, 13, 14, 15, 43 and 46 requested by plaintiffs and paragraphs 17 to 25 requested by defendant are

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ment under the terms of which they would have been assured a depletion allowance (N. T. 103). Rockhill never told Parsons that they would get the depletion on their operations on Rockhill property (N. T. 179).

[38] There are many substantial differences in Parsons' 1950 arrangement with the New York & Pennsylvania Co., Inc. and Parsons' earlier arrangements with Rockhill which would tend to give Parsons a depletable interest from the former operation, though not in the latter. Examples of such differences between the two agreements are to be found in the following conditions of Parsons' 1950 agreement with the New York & Pennsylvania Co., Inc.: if the annual tonnage requirements fell below 150,000 tons per year or increased above 250,000 tons per year, the parties agreed to renegotiate the price (par. 5 of D-31); upon written permission and the payment of royalties to be agreed upon, Parsons was permitted to sell rejected coal to third parties (par. 6 of D-31); Parsons agreed to comply with the requirements of the Bituminous Coal Open Pit Mining Conservation Act of Pennsylvania (par. 8 of D-31); the agreement could not be terminated by Parsons for three years from the date operations commenced on the premises and then only on six months' notice in writing (par. 15 of D-31) (but the New York & Pennsylvania Co., Inc. could have terminated upon ten days' written notice if Parsons failed to pay the royalty or failed to furnish and deliver coal—par. 10 of D-31); and, finally, the 1950 agreement is in writing in the form of a lease (par. 1 of D-31).

[39] During these years, Mr. Austin W. Rice, a certified public accountant, made out the annual partnership income tax returns (N. T. 62-3).

correct, but are found by the court to be of slight or no relevancy.

All plaintiffs' and defendant's Requests for Findings of Fact which are inconsistent with the foregoing are denied.

[fol. 26] DISCUSSION

See Section II, "Discussion," in *Huss et al. v. Francis R. Smith, Collector,* Civil Actions Nos. 14,775, 14,776 and 14,777 (E. D. Pa.), pages 14 to 24 of opinion filed on March 26, 1957 which outlines the law as enunciated by the various cases and is adhered to in this case. See, in particular, *Commissioner of Internal Revenue v. Mammoth Coal Co.,* 229 F.2d 535 (3rd Cir. 1955), rehearing denied 229 F.2d 539 (3rd Cir. 1956), cert. den. 352 U.S. 824 (1956).

Plaintiffs are not entitled to percentage depletion on amounts received under the oral contracts with Rockhill based on these principles:

A. *The Right of Plaintiffs to Strip Mine Was Terminable On Ten Days' Notice at the Will of the Owner of the Coal Lands.*

Only if Parsons had gone to the expense of removing the overburden, performing the heavy part of the work, meeting wages and expenses in so doing, would they have had the exclusive right to take out the coal under such overburden and to be paid the stated price per ton for it. Otherwise, Rockhill could have terminated the arrangement by giving a ten-day notice, or Rockhill, by the same ten-day notice, could have put another stripper on any area that had been allocated previously to Parsons (see Findings of Fact Nos. 17-19, 21 and 30).

Plaintiffs have failed to sustain their burden in proving the terms of the oral contracts as testified to by E. Parsons (see Findings of Fact Nos. 15 through 19 and footnotes 4, 5 and 7).

B. *Plaintiffs Had a Right to Receive a Fixed Price Per Ton, Irrespective of the Market Price.*

The situation presented by these oral contracts is one where Rockhill had the right to sell all the coal. Plaintiffs

[fol. 27] were always paid by Rockhill a stated price per ton for the strip mined coal delivered to Rockhill's railroad car (see Findings of Fact Nos. 22 and 23). Such price was adjustable to reflect increases in wage or labor costs and increases in materials or explosives, but not any changes in the market price (see Finding of Fact No. 23, and footnotes 9 and 16).

If Rockhill rejected the coal as not capable of being blended with their deep mined coal, there is no indication in the record that it was feasible for Parsons to sell to anyone else.[40] Thereafter, Parsons or Rockhill would presumably

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[40] Plaintiffs cite this sentence of paragraph 1 of P-1 as giving them the right to sell rejected coal to buyers other than Rockhill:

> "Contractor shall, at its own cost and expense, strip, remove and dispose of all overburden including rock, refuse, gob and black dirt, etc., and any coal which in the opinion of the General Manager of Coal Company may be unmarketable; . . ."

Plaintiffs point out that the testimony indicated that all the terms of P-1 (except the provisions concerning terminability) were incorporated in the oral 1942 agreement in relying on the above-quoted sentence to establish their right to sell the rejected coal. Mr. George testified that Rockhill had the right to sell "all the coal" and Parsons "had no right at all" to make such sales (N. T. 212), indicating that Parsons had no right to sell even coal rejected by Rockhill to any other buyer. In any event, the trial judge does not believe that such general testimony concerning the contents of P-1 being the same as the contents of the 1942 oral agreement and the very general language contained in the above-quoted sentence sustain plaintiffs' burden to show that it was possible for Parsons to sell the rejected coal to anyone, in view of the following items of evidence in the record:

1. The testimony concerning Parsons' duty to dispose of overburden (under the supervision of Rockhill's inspector) indicates that the reference to the coal in this sentence only refers to that type of coal which was completely unmarketable and in the nature of dirt and debris (N. T. 171, 194, 7).

2. Mr. George testified that plaintiffs did not have the right to accept coal instead of money (N. T. 221).

3. Plaintiffs never in fact sold any coal to anyone other than Rockhill (Finding of Fact 21).

4. The testimony indicates that it was not feasible for plaintiffs to sell rejected coal to anyone, even if they had such a right (see Findings of Fact 21 and 28).

Under these circumstances, plaintiffs have failed to sustain the burden of showing that any such sales to buyers other than Rockhill were feasible.

terminate the arrangement by giving the requisite termination notice. The testimony indicates that Parsons never did sell the coal to anyone other than Rockhill and coal that was [fol. 28] rejected by Rockhill was left in the pits (see Findings of Fact Nos. 20, 21, 22 and 28).[41]

C. *The Coal Remained an Asset of Rockhill, Rather Than of Plaintiffs.*

It is apparent that plaintiffs have not shown that they looked to the severance and sale of the coal on the open market for their compensation.[42] Instead, plaintiffs' compensation was directly dependent upon their personal covenants with Rockhill. This latter does not entitle plaintiffs to a depletion allowance and, therefore, they are not entitled to share in the benefits of a statute which was designed to give compensation to persons having an economic interest in the depletion of a wasting asset.[43]

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[41] This testimony distinguishes this arrangement from the oral Stevens contracts in *Huss et al. v. Francis R. Smith, Collector*, supra, where Huss had the power to, and could feasibly, sell the coal to anyone they wished, notwithstanding that Stevens rejected the coal.

[42] There is no evidence in the record that shows any definite tonnage production obligation by plaintiffs (see Finding of Fact No. 19). Also, it is noted that plaintiffs did not take the depletion deduction on their operations on Rockhill property on their partnership income tax returns, though they did take such a deduction on property other than that of Rockhill (see Findings of Fact Nos. 38 and 39).

[43] In addition to the cases cited in *Huss et al. v. Francis R. Smith, Collector*, supra, which state this principle of law, more recently the United States Court of Appeals for the Third Circuit has held in *Turkey Run Fuels, Inc. v. United States*, No. 11,973 (3rd Cir. 1957), that a taxpayer-mine owner was entitled to the depletion deduction from royalties received for coal extracted by a stripper from coal, culm and refuse banks which had been created many years before in mining operations by lessees of the taxpayer's predecessors in title to the land.

The court reasoned that since "the taxpayer is the owner of the coal, culm and refuse banks in question, of the land upon which they lie and of the coal mines from which they were extracted," such taxpayer "therefore has the economic interest therein which the Internal Revenue Code requires and which (the stripper)

These factors give the plaintiffs an economic advantage, rather than an economic interest, in the coal in place, and do not entitle them to a percentage depletion deduction.

[fol. 29] CONCLUSIONS OF LAW

1. This court has jurisdiction over the parties and the subject matter.

2. 33 P. S. § 1 has no application to these oral contracts.[44]

3. 28 U. S. C. A. § 2514 has no application to this case.[45]

4. Defendant's motion at the close of the plaintiffs' evidence for dismissal of plaintiffs' case[46] under Rule 41 of the Federal Rules of Civil Procedure, and plaintiffs' and defendant's motions at the end of all the evidence for a directed verdict[47] under Rule 50, are moot in view of paragraph 5 of these Conclusions of Law.

5. Plaintiffs, in strip mining under oral contracts with the Rockhill Coal Company in the tax years 1945 to 1949, inclusive, did not acquire an economic interest in the coal in place, entitling them to the depletion allowance on their gross income derived therefrom, pursuant to §§ 23(m) and 114(b) of the Internal Revenue Code of 1939.

6. Defendant Francis R. Smith, Former Collector of Internal Revenue for the First District of Pennsylvania, is entitled to the entry of judgment in his favor with costs.

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as lessee did not have." Therefore, "the royalties received by the taxpayer for the coal extracted from the banks . . . constituted income from mining from which the depletion allowance was deductible."

[44] See footnote 24 in *Huss et al. v. Francis R. Smith, Collector*, supra.

[45] In view of Conclusion of Law No. 5 below, it is not necessary to consider whether 28 U. S. C. A. § 2514 only applies to cases in the Court of Claims (see *Corkle v. United States*, 94 F. Supp. 908 (E. D. S. C. 1951)) and, therefore, would have no application to this proceeding.

[46] N. T. 148-9.

[47] N. T. 252.

[fol. 30]

IN UNITED STATES DISTRICT COURT

JUDGMENT ORDER—May 28, 1957

And Now, May 28, 1957, It Is Ordered that judgment be entered in favor of Francis R. Smith, Former Collector of Internal Revenue for the First District of Pennsylvania, and against Emory W. Parsons, Erma M. Parsons, Howard H. Parsons, Martha Parsons, Lawrence H. Parsons and Grace E. Parsons, with prejudice, and with costs.

/s/ Francis L. Van Dusen, J.

[fol. 30a] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

C.A. No. 15229

EMORY W. PARSONS and ERMA M. PARSONS,

vs.

FRANCIS R. SMITH, former Collector of Internal Revenue for the First District of Pennsylvania.

NOTICE OF APPEAL—Filed June 14, 1957

To the Clerk, United States Court of Appeals, Third Circuit, Philadelphia, Penna.

Please be advised that the plaintiffs in the above entitled case has this day filed Notice of Appeal to the United States Court of Appeals, Third Circuit, Philadelphia, Pennsylvania, from a Judgment or Decree of this Court by Honorable Francis L. Van Dusen.

Gilbert W. Ludwig, Clerk.

For Appellant: William R. Spofford, Esq., Charles S. Jacobs, Esq., Sherwin T. McDowell, Esq., Charles I. Thompson, Esq.

For Appellee: Harold K. Wood, Esq., U. S. Attorney.

[fol. 30b] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

C.A. No. 15230

HOWARD H. PARSONS and MARTHA PARSONS,

vs

FRANCIS R. SMITH, former Collector of Internal Revenue for the First District of Pennsylvania.

NOTICE OF APPEAL—Filed June 14, 1957

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Gilbert W. Ludwig, Clerk.

For Appellant: William R. Spofford, Esq., Charles S. Jacobs, Esq., Sherwin T. McDowell, Esq., Charles I. Thompson, Esq.

For Appellee: Harold K. Wood, Esq., U. S. Attorney.

[fol. 30c] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

C.A. No. 15231

LAWRENCE H. PARSONS and GRACE E. PARSONS,

vs

FRANCIS R. SMITH, former Collector of Internal Revenue for the First District of Pennsylvania.

NOTICE OF APPEAL—Filed June 14, 1957

To the Clerk, United States Court of Appeals, Third Circuit, Philadelphia, Penna.

Please be advised that the plaintiffs in the above entitled case has this day filed Notice of Appeal to the United States Court of Appeals, Third Circuit, Philadelphia, Pennsylvania, from a Judgment or Decree of this Court by Honorable Francis L. Van Dusen.

Gilbert W. Ludwig, Clerk.

For Appellant: William R. Spofford, Esq., Charles S. Jacobs, Esq., Sherwin T. McDowell, Esq., Charles I. Thompson, Esq.

For Appellee: Harold K. Wood, Esq., U. S. Attorney.

[fol. 31]

IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,299, No. 12,300, No. 12,301

EMORY W. PARSONS and ERMA M. PARSONS,
Appellants in No. 12,299,

HOWARD H. PARSONS and MARTHA PARSONS,
Appellants in No. 12,300,

LAWRENCE H. PARSONS and GRACE E. PARSONS,
Appellants in No. 12,301,

v.

FRANCIS R. SMITH, Former Collector of Internal Revenue for the First District of Pennsylvania.

Appeal from the United States District Court for the Eastern District of Pennsylvania.

Argued December 19, 1957

Before: Biggs, Chief Judge; and Goodrich and Hastie, Circuit Judges.

OPINION OF THE COURT—Filed March 27, 1958

HASTIE, Circuit Judge.

These are appeals by taxpayers, who are partners in a business, from a judgment of the district court denying their several claims for refunds of income taxes paid upon their respective distributable shares of certain partnership income derived from coal mining. The appellants can prevail only if the involvement of the partnership, hereinafter called Parsons, in a strip mining enterprise was such as to [fol. 32] entitle the partners to deduct a depletion allowance,

pursuant to Sections 23 (m) and 114 (b) of the Internal Revenue Code of 1939 as implemented by Treasury Regulation 111, § 29.23 (m)-1, 26 Code Fed. Reg., 1949 ed., § 29.23 (m)-1, in computing partnership income from the mining operation. The problem presented is the often difficult, though familiar and recurring one of determining whether the person claiming a depletion allowance is "the owner of an economic interest in mineral deposits" within the meaning of Treasury Regulation 111, § 29.23 (m)-1.[1]

The almost simultaneous recent decisions of this court in *Commissioner of Internal Revenue v. Mammoth Coal Co.*, 1955, 299 F.2d 535, cert. denied 352 U.S. 824, and of the Court of Appeals for the Ninth Circuit in *Usibelli v. Commissioner of Internal Revenue*, 1955, 229 F.2d 539, have gone so thoroughly into this tax problem as it arises in the context of strip mining that we shall not elaborate again the basic concepts which are discussed in those cases. It is enough to repeat that the decisions make it clear that the economic interest in coal in place which will support a percentage depletion allowance for strip mining need not amount to an estate or tenancy as understood in the law of real property. Yet, it must be something more than an independent contractor's normal right to the benefit of his bargain and the kind of "interest" which that right always gives him in the subject matter of the contract. In characterizing an asserted interest a court will be guided by the total picture revealed by the facts of the case at hand.

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"Under such provisions [Secs. 23 (m) and 114], the owner of an economic interest in mineral deposits or standing timber is allowed annual depletion deductions. . . . An economic interest is possessed in every case in which the taxpayer has acquired, by investment, any interest in mineral in place or standing timber and secures, by any form of legal relationship, income derived from the severance and sale of the mineral or timber, to which he must look for a return of his capital. But a person who has no capital investment in the mineral deposit or standing timber does not possess an economic interest merely because, through a contractual relation to the owner, he possesses a mere economic advantage derived from production." 26 Code Fed. Reg., 1949 ed., § 29.23 (m)-1.

[fol. 33] On this appeal the facts found by the district court are unchallenged. The Parsons firm is a contractor and over the years has engaged in road building, strip mining and the drilling of gas wells. Parsons derived the income involved in this case from strip mining conducted on land owned by the Rockhill Coal Co.

In preliminary negotiations Rockhill had proposed that Parsons undertake extensive stripping of the area in question under a detailed written contract and, to that end, Rockhill actually drafted a proposed contract. But Parsons refused to sign the agreement stating that it did not wish to be bound to a long term performance because, if opportunity should arise, it wished to return to road building. Accordingly, it was agreed that the partnership would proceed with stripping in the designated area under a terminable oral agreement. The essential provisions of that oral contract are set out in the trial findings.

The agreement defined the area to be mined but left the partnership free to work as it chose. The partnership understood that it was not obligated to mine the tract to exhaustion. Indeed, although operations under the oral agreement were conducted from time to time over an eight year period, the tract still contained much strippable coal when Parsons terminated its operations. Some of this coal was later mined by another contractor. Moreover, it was mutually understood from the beginning, in the light of the already mentioned desire of the partnership to be free to change from stripping to road building on short notice, that either party could terminate the oral agreement on ten days notice. In this connection it was understood that after notice of termination by the landowner the partnership would still be privileged to remove and the landowner obligated to accept usable coal from which the partnership had actually removed the overburden—this constituting the major part of the stripping operation—before the notice was received.

It was agreed that the partnership should deliver the coal it mined to Rockhill's railroad cars and to no one else. In [fol. 34] practice any coal which Rockhill rejected as unsuitable for its purpose was left in the pits as unsaleable. The parties agreed in advance upon a stipulated price per ton which Rockhill was to pay Parsons for usable coal.

This price was not geared to and did not vary with the market price of coal. However, the price could be and on occasion was altered to reflect increased costs of production.

Parsons made a considerable investment in movable equipment used in the Rockhill stripping operation. Early in the taxable period the partnership committed to this job its own equipment valued at some $210,000. At the same time it was using about $130,000 worth of Rockhill equipment under a rental agreement with the landowner. As the work progressed the partnership rented an increasing amount of Rockhill equipment and used less of its own. There is no indication that the partnership equipment had utility only for this job or was specially adapted to it.

We are satisfied that what the parties agreed and what they did disclose the partnership acting only as an ordinary independent contractor in mining the Rockhill tract. First, the matter of compensation was handled as in an ordinary contract job. The partnership had no freedom to sell or dispose of the coal to its own account. It was entitled only to an agreed price from the owner of the mining property. And since that price did not fluctuate with the market, there is nothing about the scheme of payment to indicate any interest of the contractor in the mineral. If we ask how this arrangement for payment to the partnership for its work differed from the normal payment to an independent contractor for accomplishing an agreed result, it is immediately apparent that there is no significant difference.

The other important factor on this record is the agreed duration of the enterprise. Here it is noteworthy that the partnership did not enter the job with any understanding that it would mine the tract to exhaustion, and that it did not in fact do so. Rather, it was concerned from the [fol. 35] beginning to remain free to discontinue stripping at any time. The terminability of the agreement on short notice was an essential and significant part of the bargain, not a mere formality inserted by some cautious draftsman. The logical conclusion from all of this is that the partnership contemplated and bargained for no economic interest in the mineral it agreed to extract beyond the independent contractor's normal concern with any subject matter with

which he is to work for an agreed price. True, the ten day notice could not be used to deprive Parsons of compensation for work it already had done in removing the overburden from particular coal. But this special limited right to complete work already far advanced does not destroy the character of the contract as one deliberately made terminable on very short notice.

The cases support this view of the matter. While the courts characteristically look at the entire context in deciding whether mining contractors have depletable interests in the mineral in place, the stripper usually bases his claim upon one or both of the factors discussed above. In some circumstances the stripper's right to mine the deposit to exhaustion, or even for a rather considerable period without particular reference to exhaustion, is stressed. See *Commissioner of Internal Revenue v. Mammoth Coal Co., supra; Stilwell v. United States,* 4th Cir., 1957, 250 F.2d 736; *Winfield Mining & Contracting Co.,* 1954, 13 TCM 571; *James Ruston,* 1952, 19 T.C. 284; *cf.* G.C.M. 26290, 1950-1 Cum. Bull. 42. In others the fact that the stripper's income from the mining operation varies in accordance with the market price of the mineral makes his claim of depletable interest persuasive. See *Commissioner of Internal Revenue v. Gregory Run Coal Co.,* 4th Cir. 1954, 212 F.2d 52, cert. denied, 348 U.S. 828 (Vincent-Swaney contract); *Virginia B. Coal Co.,* 1956, 25 T.C. 899; *Paul E. Barry, Inc.,* 1955, 14 TCM 37; *Winfield Mining & Contracting Co., supra; James Ruston, supra.* But see *C. A. Hughes & Co.,* 1955, 14 TCM 172. But unless some such special circumstance ap- [fol. 36] pears, differentiating the arrangement from the ordinary contract job, there is analytically no basis upon which the stripper, who has no conventional property in the mineral, can claim a depletable interest therein.

Appellants attach much significance to recent borderline cases in which the Court of Appeals for the Fourth Circuit has found that contractors engaged in strip mining on land of others were entitled to depletion allowances. See *Stilwell v. United States, supra; Commissioner of Internal Revenue v. Gregory Run Coal Co., supra; Weirton Ice & Coal Supply Co. v. Commissioner of Internal Revenue,* 4th Cir. 1956, 231 F.2d 531; *Commissioner of Internal Revenue*

v. Hamill Coal Corp., 4th Cir. 1956, 239 F.2d 347. That court has certainly gone as far as any other in recognizing depletable interests in strippers. But in the cited Fourth Circuit decisions we find repeated emphasis upon the court's factual conclusion that the real understanding of the parties was that the strip miners would be allowed to exhaust the mineral, or at least to continue stripping operations for a very substantial time. Only in one of the arrangements considered in *Commissioner of Internal Revenue v. Gregory Run Coal Co., supra,* does this factor seem to have been absent. And there the owner and the strip miner had formalized their relationship in an agreement terming the strip mining project "this joint adventure." How much weight the court accorded this indication of the way the parties themselves viewed their relationship, we do not know. Perhaps no more can be said than that distinguishing facts usually prevent reasoning by analogy from being very helpful in borderline cases. In any event, we think the reasoning of the Fourth Circuit cases requires the stripper to marshal more significant indicia of interest in the mineral than the present record will yield.

One other point deserves separate mention. In these mining cases the allowance of a percentage depletion deduction from gross income for tax purposes is premised on the conception that a tax free recovery of capital actually [fol. 37] invested in a wasting mineral deposit is fair. See *Commissioner of Internal Revenue v. Southwest Exploration Co.*, 1956, 350 U.S. 308, 312. The commitment of capital as an investment in the exploitation of a given mineral deposit must be real and unequivocal. Otherwise, mining contractors, like contractors generally, must look to "receive" their tax benefit through depreciation and obsolescence allowances, and not through an allowance for the depletion of the mineral deposit on which they happen to be working." See *Usibelli v. Commissioner of Internal Revenue, supra,* 229 F.2d at 541.

Here the only thing set up as a capital investment in the Rockhill coal deposits is Parsons' purchase of a considerable quantity of movable equipment, accompanied by the rental of other equipment from Rockhill. There has been no showing that this equipment was specially adapted

to this job or that it would not be suitable thereafter for such other undertakings as constituted the normal and familiar business of this contractor. Thus, quite apart from considerations relating to compensation and the terminability of the contract, it is very doubtful whether investment in equipment of general utility in a contractor's business is the type of capital expenditure which can properly be found to constitute an investment in a particular mineral deposit which the contractor has undertaken to work.

For these reasons we agree with the district court that the tax refund claims in suit are not well founded.

The judgment will be affirmed.

[fol. 38] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12300 (D.C. 15230)

EMORY W. PARSONS and ERMA M. PARSONS, Appellants,

vs.

FRANCIS R. SMITH, former Collector of Internal Revenue for the First District of Pennsylvania.

JUDGMENT—March 27, 1958

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:

/s/ Ida O. Creskoff, Clerk.

March 27, 1958

[fol. 39] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12300 (D.C. 15230)

HOWARD H. PARSONS and MARTHA PARSONS, Appellants,

vs.

FRANCIS R. SMITH, former Collector of Internal Revenue for the First District of Pennsylvania.

JUDGMENT—March 27, 1958

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:

/s/ Ida O. Creskoff, Clerk.

March 27, 1958

[fol. 40] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12301 (D.C. 15231)

LAWRENCE H. PARSONS, and GRACE E. PARSONS, Appellants,

vs.

FRANCIS R. SMITH, former Collector of Internal Revenue for the First District of Pennsylvania.

JUDGMENT—March 27, 1958

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:

/s/ Ida O. Creskoff, Clerk.

March 27, 1958

[fol. 41]

IN UNITED STATES COURT OF APPEALS

MOTION FOR EXTENSION OF TIME TO FILE PETITION FOR REHEARING AND ORDER GRANTING SAME—April 10, 1958 (omitted in printing)

[fol. 42a] [File endorsement omitted]

[fol. 43]

IN UNITED STATES COURT OF APPEALS

PETITION FOR REHEARING—Filed April 25, 1958

Appellants, Emory W. Parsons, Erma M. Parsons, Howard H. Parsons, Martha Parsons, Lawrence H. Parsons, and Grace E. Parsons, petition for rehearing pursuant to Rule 33 of the Rules of this Court.[1]

During the taxable years in question Appellants Emory W. Parsons, Howard H. Parsons, and Lawrence H. Parsons were partners in an enterprise engaged in the business of strip-mining coal in the bituminous regions of Pennsylvania. The issues with respect to which suits were filed by the partners and their respective wives related to the right of the partnership to claim a deduction for percentage depletion with respect to amounts received by the

[1] Upon Motion, the time for filing a Petition for Rehearing was extended to April 25, 1958.

partnership for coal stripped by it and delivered to Rockhill Coal Company ("Rockhill") during the taxable years in question, thereby reducing each partner's distributable share of partnership net income. In its decision filed March 27, 1958, the Court determined that the partnership was not entitled to a deduction for depletion. For convenience, the partnership is hereinafter referred to as "Parsons".

Rehearing is respectfully requested on the following grounds:

(1) The opinion of the Court rests upon three grounds, two of which are, we submit, inconsistent with the Court's earlier decision in *Commissioner v. The Mammoth Coal Company*, 229 F. 2d 535 (3rd Cir. 1955), rehearing denied, 229 F. 2d 539 (1956), cert. den., 352 U. S. 824 (1956). The third ground, we submit, fails to give sufficient weight to certain facts in the record. Specifically:

(a) The Court relied in part upon the fact that Parsons received a stated price per ton of coal mined and delivered to Rockhill, rather than a price which fluctuated with the market. The effect of the Court's reliance upon [fol. 44] this fact appears to negate its earlier decision in *Mammoth*, wherein the Court had stated (229 F. 2d at 538-9):

> "The fact that, instead of retaining coal, the stripper received so much per ton for that coal which first had to be offered to and accepted by the [owner] should make no difference, for in any event the stripper had to look to the coal which it mined for return of its investment and profit."

The Court's action is difficult to understand in view of the fact that both parties conceded on brief that the method of payment is irrelevant. Thus, the Court has on its own motion resurrected an issue which both parties believed had been conclusively laid to rest in *Mammoth*.

Indeed, the Commissioner has significantly changed his position in this respect in his proposed regulations under the Internal Revenue Code of 1954. For many years

his Regulations provided that a taxpayer, to possess an economic interest, must derive income from the "severance *and sale*" of the mineral.[2] His proposed regulations under the 1954 Code recognize that there need be no relationship between the market price and the price paid to the stripper by providing that an economic interest is possessed in every case where the taxpayer secures income derived from the "severance *or sale*" of the mineral.[3]

(b) The Court relied in part upon the fact that Parsons had no capital investment in the enterprise beyond the dedication of some $300,000 of equipment (either purchased or leased) to the job. In the Court's view, it was "very doubtful whether investment in equipment of general utility in a contractor's business is the type of capital expenditure which can properly be found to constitute an investment in a particular mineral deposit which the contractor has undertaken to work". This statement by the [fol. 45] Court is, we submit, inconsistent with its earlier decision in *Mammoth*, where the stripper's investment was of precisely the same nature. Indeed, under the Court's new view, *no* stripper would have the requisite capital investment, for virtually all stripping equipment is suitable for building roads and similar work.

The fact that Parsons may have been entitled to depreciation deductions does not alter the conclusion that it had an economic interest in the coal. No one would dispute the proposition that if Rockhill had undertaken the operation as fee owner of the mineral, it would have been allowed deductions for *both* depletion and depreciation. It is likewise obvious that Parsons could receive no tax benefit from depreciation deductions unless it was successful in finding marketable coal, and received gross income against which the deductions could be applied. Parsons' investment in the mineral was its undertaking to stake its know-how, payroll, and equipment in the enterprise on the gamble that marketable coal could be discovered and exploited.

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[2] U. S. Treas. Reg. 118, § 39.23(m)-1(b).

[3] Prop. Reg. § 1.611-1(b)(1).

(c) Finally, the Court relied in part upon the fact that Parsons' contract with Rockhill was terminable by either party upon ten days' notice. The fact that Parsons had an indefeasible right to strip uncovered coal was minimized on the ground that "this special limited right to complete work already far advanced does not destroy the character of the contract as one deliberately made terminable on very short notice." As a practical matter, the right had considerable value, and would have permitted Parsons (had Rockhill terminated) to strip and sell to Rockhill substantial quantities of coal from every cut.

In connection with its discussion of the terminability feature of Parsons' contract, the Court discussed the line of recent decisions in the Court of Appeals for the Fourth Circuit. Although the Court termed these decisions "borderline cases", it is difficult to conceive of a decision more squarely in point and more contrary to the present decision [fol. 46] than the Fourth Circuit's holding in *Weirton Ice and Coal Supply Company v. Commissioner*, 231 F. 2d 531, 535-36 (4th Cir. 1956), wherein the Court stated:

> "No stronger proof that Weirton had in effect the right to mine the coal could be found than in its willingness to invest $500,000 in the enterprise. It is of no moment that the owner of the mineral, as in other cases in which the right of an extractor to a deduction for depletion has been upheld, had the option to terminate the arrangement at any time, for as the event proved, Weirton actually mined the coal during all of the taxable years. We think that Weirton's rights were dependent solely upon the extraction and delivery of the coal, and that the relationship of the parties to the ore in place gave it an economic interest in the mineral and entitled it to share with National the depletion allowance provided by the statute."

The emphasis of the Court in *Weirton* was not upon the right of the stripper to mine forever, but upon the fact that the stripper had actually mined the coal with respect to which depletion allowances were sought. Not only did Parsons mine the coal during the taxable years, but that coal which it did so mine was coal which (having been un-

covered) it had an enforceable right to mine and sell despite any action which Rockhill might take. It is submitted that the Court has too greatly minimized not only the value, but also the indefeasible nature of Parsons' right to strip uncovered coal.

(2) The Court's decision, we submit, gives insufficient weight to the fundamental purpose of the depletion allowance, which is to reward those who bear the risk of discovering the mineral.[4] Nowhere in its opinion does the Court recognize the often repeated direction of the Supreme Court of the United States, that depletion deduc-[fol. 47] tions are to be allowed in "every case in which the taxpayer has acquired, by investment, any interest in the oil in place, and secures, by any form of legal relationship, income derived from the extraction of the oil, to which he must look for a return of his capital." *Palmer v. Bender,* 287 U. S. 551, 557 (1933).

The Congressional policy to encourage the discovery and exploitation of the Nation's natural resources extends to every miner, regardless of the size of the enterprise, if he must look for his income to the " 'possibility of profit' from the use of his rights over production, 'dependent solely upon the extraction and sale' " of the mineral. *Burton-Sutton Oil Company v. Commissioner,* 328 U. S. 25, 34 (1946).

It is clear beyond dispute that Parsons falls within the foregoing Congressional policy as implemented by the Supreme Court. The Court's assumption that Parsons was no different from the ordinary independent contractor is, we submit, erroneous. Some stripping contractors operate under cubic yardage contracts and are paid whether or not they are successful in finding coal. As to them, the Court would be correct in denying depletion allowances. Parsons' arrangement, however, was wholly different. Under its contract it received no income whatever unless and until it was successful in finding and producing marketable coal. Manifestly, therefore, to it must belong the

[4] Sen. Rep. No. 617, 65th Cong., 3rd Sess., 1939-1 (Part 2) Cum. Bull. 122; H. R. Rep. No. 1, 69th Cong., 1st Sess., 1939-1 (Part 2) Cum. Bull. 319.

reward granted by Congress to entrepreneurs who prospect for and produce minerals at the risk of losing their entire investment if they are unsuccesful.

The Court's opinion proceeds upon the premise that since Parsons was like the ordinary contractor, some special provision must be found in its contract to entitle it to depletion allowances. The premise, we submit, is incorrect. Since Parsons' income was entirely dependent upon the discovery and production of coal, and since it bore the entire risk of the enterprise, it falls four square within the [fol. 48] class intended to be encouraged and benefited by the depletion allowance. No further ingredient need be added.

For all of the foregoing reasons, it is respectfully requested that a rehearing be granted.

Wililam R. Spofford, Sherwin T. McDowell, Charles I. Thompson, Jr., Attorneys for Appellants.

Ballard, Spahr, Andrews & Ingersoll, of Counsel.

[fol. 49]

IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,299, No. 12,300, No. 12,301

EMORY W. PARSONS and ERMA M. PARSONS,
Appellants in No. 12,299,

HOWARD H. PARSONS and MARTHA PARSONS,
Appellants in No. 12,300,

LAWRENCE H. PARSONS and GRACE E. PARSONS,
Appellants in No. 12,301,

v.

FRANCIS R. SMITH, Former Collector of Internal Revenue for the First District of Pennsylvania.

SUR PETITION FOR REHEARING

Present: Biggs, Chief Judge; and Maris, Goodrich, Staley and Hastie, Circuit Judges.

OPINION OF THE COURT ON DENIAL OF PETITION FOR REHEARING—May 29, 1958

Per Curiam:

This petition for rehearing raises no point of substance that has not already been considered and decided against the petitioner. Accordingly, the petition is denied.

[fol. 50] KALODNER, Circuit Judge, dissenting.

I am of the opinion that a rehearing should be granted, and the judgment of the district court reversed.

This result is required for the reasons I have given in my dissenting opinion in the Huss cases.

The taxpayers here, as in the Huss cases, were granted an exclusive right to remove all the merchantable coal in place in the reserved or leased area. They had a right of control over production of the mineral in place which gives rise to the economic interest necessary for the depletion allowance. Burton-Sutton Oil Co. v. Commissioner, 328 U.S. 25, 29, 32 (1946). All the coal involved was produced during the existence of this interest. The fact that such interest might have been brought to an end some day in the future is not a relevant consideration.

[fol. 51] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—May 29, 1958

After due consideration the petition for rehearing in the above-entitled cases is hereby denied.

Dated: May 29, 1958

[fol. 52] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 53]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—October 13, 1958.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted. The case is consolidated with No. 305 and a total of two hours allowed for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.